Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–23–17 OF 1998
KAMALANATHAN RATNAM J
29 DECEMBER 1999

Tort *— Defamation — Libel — Article alleged that plaintiffs as shareholders would make large profits by charging exorbitant rooms rates — Exorbitant rates proved wrong — Defence of fair comment — Objective test applied — Intention of defamer not relevant — Whether article read as a whole was defamatory — Plaintiffs gravely injured in reputation — Whether aggravated damages should be awarded*

The plaintiffs were businesswomen involved in the tourism and hotel industry. The plaintiffs teamed up with a British company, Byrom Consultants Ltd ('Byrom') and formed Seamos Marketing Sdn Bhd ('Seamos') to make a bid for providing accommodation during the Commonwealth Games. However, the arrangement between the parties fell through and the plaintiffs transferred all their shares in Seamos to Byrom's nominees and resigned as directors of Seamos on 21 July 1997 as shown in Form 49 of the Companies Act 1965 and lodged with the Companies Registry. On 8 and 10 February 1998 respectively, two articles were published in *The New Straits Times* alleging, inter alia, that the plaintiffs as shareholders of Seamos would make large profits by charging exorbitant rooms rates. The plaintiffs sued the defendants for libel. The defendants pleaded the defence of fair comment.

Held, allowing the plaintiff's claim:

(1) Both the plaintiffs were no longer either shareholders or directors or in any way involved with Seamos at the time the articles were published. Whilst the defendants could have easily ascertained whether the plaintiffs were indeed at the material time of the publication, directors and/or shareholders of Seamos by making a search at the Registrar of Companies, the defendant had failed to do so. In any case, in a defence of fair comment, the onus was on the defendants to prove any allegations of facts to be true, and this the defendants had failed to do (see p 186A–D).

(2) The articles when read as a whole would lead those who were dealing with the plaintiffs to the conclusion that the articles referred to them and that both the articles were defamatory of the plaintiffs and were written with the intention of identifying them. The test is an objective test. The inference that is clearly drawn from the articles was that the plaintiffs as shareholders in Seamos would make millions from the raised hotel rates. The result would be that the tourists would conclude that the hotel rates were far too high and this would prevent tourists from visiting Malaysia (see p 186I–187B).

(3) Whether the words complained of are defamatory or not is a question of fact depending on the circumstances of each case. In the present case, the articles clearly suggested that the plaintiffs cared only to make a quick buck and had no regard to the fact that such conduct would have an adverse effect upon tourists visiting this country and especially during the Commonwealth Games and the plaintiffs being involved in the hotel industry would no doubt be adversely affected by such publications (see p 187H–I).

(4) Not only words and sentences can be defamatory, it is also possible, after reading the entire article, to hold that the article read as a whole was defamatory of the plaintiffs because of the chain of events entwined through out the article, to form a tapestry, that portrayed the plaintiffs as the ones defamed (see p 188A–B).

(5) The averment as a fact that the plaintiffs owned Seamos was a fatal crack to the defence of fair comment. Further, the statement as a fact that the room rates were indeed exorbitant was again proven wrong through the evidence that was led (see p 188D–E).

(6) Where the defendants rely on the defence of fair comment, it is necessary for the defendants to indicate what are the facts and what are the comments. Where the facts and comments are so intermingled as in this case, the reasonable reader would assume that the injurious statements were clearly based on adequate factual grounds known to the writers. It is trite law that any statement which does not indicate with reasonable clarity that it is a mere comment and not a statement of fact cannot be protected by the defence of fair comment (see pp 188H–189A).

(7) Section 9 of the Defamation Act 1957 did not come to the aid of the defendants. There was a fatal fundamental flaw in the defendants' assertion as a fact that the plaintiffs were owners of Seamos at the material time of the publication when such was not a fact at all (see p 189C).

(8) It is set law that where a defendant is indifferent to the truth or otherwise of the words complained of, express or actual malice may be inferred. It was clear that the first defendant had acted recklessly in failing to carry out any proper enquiry of the plaintiffs' status in Seamos before concluding that they owned Seamos. It is necessary that responsible newspapers insist that proper checks be made of basic facts which facts can easily be ascertained before publishing the articles. It is trite law that a writer may not suggest or invent facts and then comment upon them on the assumption that they are true (see pp 189E, 190A–B).

(9) Libel does not depend on the intention of the defamer and it is irrelevant to consider the meaning the writers and publisher intended to convey. Whatever the intention of the first defendant, by linking the plaintiffs to the company that was behind the

excessive mark-up of the hotel rates, when the plaintiffs had nothing to do with the said company, the first defendant had clearly embroiled the plaintiffs with the issue (see p 190D–F).

(10) The court found that the plaintiffs hold themselves high in the business world and, considering the fact that *The New Straits Times* has a wide circulation in the country, there was no doubt that the plaintiffs had by the publications been brought to ridicule and contempt. The plaintiffs had been gravely injured in their reputation. Having considered all factors, the court awarded the first plaintiff general damages in the sum of RM300,000 and the second plaintiff the sum of RM200,000 (see p 191D–F).

(11) In the light of the fact that no offer of apology had been tendered and considering the reckless manner in which the articles were written, clothing a non-existent with the mantle of truth, the award under aggravated damages must reflect the uncaring attitude of the defendants. The court awarded each of the plaintiffs a sum of RM200,000 as aggravated damages (see p 192A–B).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan ahli perniagaan yang terlibat di dalam industri pelancongan dan perhotelan. Plaintif-plaintif telah bergabung dengan sebuah syarikat British, Byrom Consultants Ltd ('Byron') dan membentuk Seamos Marketing Sdn Bhd ('Seamos') untuk membuat satu tawaran bagi memperuntukkan penempatan semasa Sukan Komanwel. Bagaimanapun, rancangan antara kedua-dua belah pihak tidak berjaya dan plaintif-plaintif telah memindahkan semua saham-saham mereka di dalam Seamos kepada penerima namaan Byrom dan meletak jawatan sebagai pengarah-pengarah Seamos pada 21 Julai 1997 sebagaimana yang ditunjukkan di dalam Borang 49 Akta Syarikat 1965 dan membuat aduan kepada Pendaftar Syarikat. Pada 8 dan 10 Februari 1998 masing-masing, dua artikel telah diterbitkan di dalam akhbar *The New Straits Times* yang telah membuat aduan, antara lain, bahawa plaintif-plaintif sebagai pemegang-pemegang saham Seamos akan memperoleh keuntungan besar dengan mengenakan kadar harga bilik yang sangat tinggi. Plaintif-plaintif telah menyaman defendan-defendan untuk libel. Defendan-defendan telah membuat rayuan pembelaan komen berpatutan.

Diputuskan, membenarkan tuntutan plaintif:

(1) Kedua-dua plaintif tidak lagi merupakan pemegang-pemegang saham atau pengarah-pengarah atau di dalam apa-apa cara pun terlibat dengan Seamos pada masa artikel-artikel tersebut diterbitkan. Walaupun defendan-defendan boleh dengan senang memastikan sama ada plaintif-plaintif sememangnya pada masa matan penerbitan tersebut adalah pengarah-pengarah dan/atau pemegang-pemegang saham Seamos dengan membuat carian di Pendaftar Syarikat tetapi defendan telah gagal untuk berbuat

demikian. Di dalam apa keadaan di mana wujud satu pembelaan komen berpatutan maka beban adalah pada defendan-defendan untuk membuktikan apa-apa dakwaan-dakwaan fakta tersebut itu adalah benar dan inilah yang defendan telah gagal lakukan (lihat ms 186A–D). A

(2) Artikel-artikel tersebut apabila dibaca secara keseluruhannya akan membawa mereka yang berurusan dengan plaintif-plaintif untuk sampai ke satu kesimpulan bahawa artikel-artikel tersebut merujuk kepada mereka dan bahawa kedua-dua artikel tersebut berunsur fitnah terhadap plaintif-plaintif dan telah ditulis dengan niat untuk dikaitkan dengan mereka. Ujian yang patut digunakan adalah ujian objektif. Inferens yang jelas dinyatakan daripada artikel-artikel tersebut adalah bahawa plaintif-plaintif yang merupakan pemegang-pemegang saham di dalam Seamos akan meperoleh jutaan wang ringgit daripada peningkatan kadar harga hotel tersebut. Kesan daripada itu adalah pelancong akan membuat kesimpulan bahawa kadar harga hotel telah melambung amat tinggi dan ini akan menghalang pelancong daripada melawat Malaysia (lihat ms 186I–187B). B C D

(3) Sama ada perkataan-perkataan yang diadukan berunsur fitnah atau tidak adalah satu persoalan fakta bergantung kepada keadaan-keadaan setiap kes. Di dalam kes ini, artikel-artikel tersebut dengan jelas mencadangkan bahawa plaintif-plaintif cuma menghiraukan tentang mendapat duit cepat dan tidak menghiraukan tentang fakta bahawa perbuatan sedemikian akan mengakibatkan kesan yang buruk terhadap pelancong yang melawat negara ini dan terutamanya semasa Sukan Komanwel dan plaintif-plaintif yang terlibat di dalam industri perhotelan tersebut tanpa diragui akan terjejas akibat daripada penerbitan tersebut (lihat ms 187H–I). E F

(4) Bukan hanya perkataan-perkataan dan ayat-ayat boleh berunsur fitnah, adalah mungkin juga, jika setelah membaca keseluruhan artikel, untuk mengatakan bahawa artikel tersebut keseluruhannya adalah berunsur fitnah terhadap plaintif kerana rantaian kejadian yang berlaku sepanjang artikel tersebut, yang membentuk satu tapestri, menggambarkan bahawa plaintif-plaintiflah yang telah difitnahkan (lihat ms 188A–B). G

(5) Penegasan yang nyata bahawa plaintif-plaintif memiliki Seamos merupakan satu percubaan yang membawa padah untuk membuat pembelaan komen berpatutan. Tambahan pula, kenyataan yang nyata bahawa kadar harga bilik yang sememangnya tinggi juga sekali lagi telah dibuktikan salah melalui keterangan yang telah dikemukakan (lihat ms 188D–E). H

(6) Di mana defendan-defendan bergantung kepada pembelaan komen berpatutan, adalah perlu untuk defendan-defendan menunjukkan apakah fakta-fakta dan apakah aduan-aduan yang wujud. Di mana fakta-fakta adalah amat bercampur seperti di dalam kes ini, seorang pembaca yang munasabah akan I

menganggap bahawa kenyataan yang memudaratkan dengan jelas berdasarkan alasan-alasan fakta yang mencukupi yang diketahui oleh penulis. Adalah undang-undang lapuk di mana apa-apa kenyataan yang tidak menunjukkan dengan kejelasan munasabah bahawa ia hanya satu komen dan bukan satu kenyataan fakta tidak boleh dilindungi oleh pembelaan komen berpatutan (lihat ms 188H–189A).

(7) Seksyen 7 Akta Fitnah 1957 tidak mampu membantu defendan-defendan. Wujud satu kecacatan asas yang membawa padah di dalam penegasan defendan-defendan yang nyata bahawa plaintif-plaintif merupakan pemilik Seamos pada masa matan penerbitan tersebut apabila tidak wujud langsung apa-apa fakta yang sedemikian rupa (lihat ms 189C).

(8) Adalah undang-undang yang ditetapkan bahawa apabila defendan tidak menghiraukan tentang kebenaran atau sebaliknya tentang perkataan-perkataan yang diadukan, niat jahat yang nyata atau sebenar bolehlah dibuat inferens. Adalah jelas bahawa defendan pertama telah bertindak dengan melulu dan gagal untuk melaksanakan apa-apa siasatan yang betul tentang status plaintif-plaintif di dalam Seamos sebelum membuat kesimpulan bahawa merekalah yang memiliki Seamos. Adalah perlu untuk akhbar-akhbar yang bertanggungjawab menegaskan semakan yang betul dibuat tentang fakta-fakta yang asas di mana fakta-fakta boleh dengan mudah dipastikan sebelum penerbitan artikel-artikel. Adalah undang-undang lapuk bahawa seorang penulis tidak mungkin mencadangkan atau mereka fakta dan kemudiannya mengkomennya dengan andaian bahawa ia adalah benar (lihat ms 189E, 190A–B).

(9) Libel tidak boleh bergantung kepada niat orang yang memfitnah dan adalah tidak relevan untuk mempertimbangkan apakah maksud yang ingin disampaikan oleh penulis-penulis dan penerbit. Apa sekalipun maksud defendan pertama, dengan mengaitkan plaintif-plaintif dengan syarikat yang meningkatkan kadar harga hotel yang berlebih-lebihan tersebut, tatkala plaintif-plaintif tidak terlibat dengan apa-apa berkaitan dengan syarikat tersebut, defendan pertama telah dengan nyata membabitkan plaintif-plaintif dengan isu tersebut (lihat ms 190D–F).

(10) Mahkamah mendapati bahawa plaintif-plaintif telah menonjolkan diri mereka sebagai berjaya di dalam dunia perniagaan dan, dengan mempertimbangkan hakikat bahawa *The New Straits Times* mempunyai edaran luas di negara ini, tidak boleh diragukan bahawa plaintif-plaintif melalui penerbitan tersebut telah dimalukan dan dihina. Plaintif-plaintif telah dicemari nama dan reputasi baik mereka. Setelah mempertimbangkan semua faktor-faktor, mahkamah telah memberi award kepada plaintif pertama ganti rugi am sebanyak RM300,000 dan plaintif kedua sebanyak RM200,000 (lihat ms 191D–F).

(11) Dengan mengambil kira fakta bahawa tiada tawaran untuk meminta maaf telah dikemukakan dan mempertimbangkan sifat melulu di mana artikel-artikel tersebut telah ditulis, menyelubungi apa yang sebenar tidak wujud dengan litupan kebenaran, award tersebut di bawah ganti rugi teruk (aggravated damages) seharusnya menggambarkan sikap tidak peduli defendan-defendan. Mahkamah mengawardkan setiap plaintif sebanyak RM200,000 sebagai ganti rugi teruk (lihat ms 192A–B).]

Notes

For cases on libel generally, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 165–230.

Cases referred to

Charleston & Anor v News Group Newspapers Ltd [1995] 2 WLR 450 (refd)
Hunt v Star Newspaper Co Ltd [1908] 2 KB 309 (refd)
Joshua Benjamin Jeyaretnam v Goh Chok Tong [1989] 3 MLJ 1 (refd)
Ratus Mesra Sdn Bhd v Shaik Osman Majid [1999] 3 MLJ 529 (refd)

Legislation referred to

Companies Act 1965 Form 49
Defamation Act 1957 s 9

GK Ganesan (*S Chrishanthini* with him) (*GK Ganesan Saiful & Rokiah*) for the plaintiffs.

Ahmad Redza Abdullah (*T Shanti* and *Mohd Nadzim Ibrahim* with him) (*Shahrizat & Tan*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The first plaintiff is a businesswoman involved in the tourism and hotel industry and is the main shareholder and executive director of several companies connected with tourism and hotel services, including SMAS Travels Sdn Bhd, SMAS Rent A Car Sdn Bhd, Traveltrade Sdn Bhd, Residence Hotels Management Sdn Bhd, which runs several hotels including the Hotel Armada Petaling Jaya and Residence Resort Paka in Terengganu. She is also a director and shareholder in a company whose shares are listed in the first board of the Kuala Lumpur Stock Exchange, that is, Lien Hoe Corporation Berhad, and is also well known to the public, particularly to those in the tourism and hotel industry as 'Nonni Mahmood'. The second plaintiff is also a businesswoman involved in the tourism and hotel services industry. She is also the main shareholder and

director of several companies dealing with tourism and hotel services, including Residence Hotels Management Sdn Bhd, which runs several hotels, including the Hotel Armada in Petaling Jaya and Residence Resort Paka in Terengganu and she was also a member of the Board of Directors of the Malaysian Tourism Promotion Board which is under the aegis of the Ministry of Culture, Arts and Tourism, and she is also well known to the public, particularly to those in the tourism and hotel industry, as 'Rohana Ramli'. Since both the fathers of both the plaintiffs were close friends, the second plaintiff used to virtually live with the first plaintiff and her father virtually adopted the second plaintiff as his twelfth child. It was inevitable therefore that both the plaintiffs would team up to run a hotel management company called Residence Hotels Management Sdn Bhd ('Management Company') since the second plaintiff personally had the knowhow in hotel management having earlier worked as the Director of Marketing for the Hilton Hotel and then moving on to the Pan Pacific Hotels & Resorts. It is not in dispute that both the plaintiffs have had at least 20 years of experience in the hotel industry. The plaintiffs' management company now manages and operates the Hotel Armada in Petaling Jaya, the Residence Resort Paka in Paka, Terengganu, the Crescent Bay Resort in Yue Yang City, China, and the Residence Hotel at Universiti Tenaga Nasional at Bangi, Selangor.

Before I consider the articles in question, it is necessary to narrate certain other relevant background facts. The plaintiffs jointly set up a company called Seamos Marketing Sdn Bhd ('Seamos') with two other British citizens who owned a British company called Byrom Consultants Ltd ('Byrom'). The Commonwealth Games was set to take place in Kuala Lumpur. Visitors, tourists and participants of the games needed accommodation. For this purpose Sukom Ninety Eight Bhd ('Sukom') was set up to manage the Commonwealth Games. Sukom then set up a body called Sukom Accommodation Bureau ('Bureau') to be in charge of providing accommodation during the Commonwealth Games on behalf of Sukom. Byrom was also involved in the tourism and hotel services and had had extensive experience during the previous World Cup and other international tournaments and in organising hotel accommodation and the related services. The Project Coordinator for Byrom was one John Raymond Eades. Sometime in May 1996 Byrom was invited by Sukom to present, at the Hotel Istana, a package by which Byrom proposed to manage, coordinate and control the hotel accommodation and reservation system for the Commonwealth Games, for Sukom. The plaintiffs together with over 70 other hotel representatives were invited for this presentation. The plaintiffs teamed up with Byrom and formed Seamos to make a bid with Sukom. The plaintiffs were impressed with Byrom's Room Reservation System form of check-in, which they found 'unusual, effective and efficient'. They wanted to also at the same time learn from Byrom this technique which would benefit their local hotel and tourism industry and enhance their hotel management services. It was agreed that the plaintiffs would assist Seamos with their local expertise, knowledge and contacts whilst Byrom would teach them the new check-in technique. However, this arrangement fell through because the plaintiffs realised that Byrom was

managing Seamos 'without our greater consultative participation, contrary to our expectation'. Agreeing to part as friends the plaintiffs transferred all their shares in Seamos to Byrom's nominees and resigned as directors of Seamos on 21 July 1997 as shown in Form 49 of the Companies Act 1965 and lodged with the Companies Registry. A

The plaintiffs thus sued for libel the first and second defendants as authors of two articles published on 8 and 10 February 1998 in *The New Straits Times* and the claim against the third, fouth and fifth defendants is based on the fact that they were at all material times the Sports Editor, Group Editor and Publisher respectively of *The New Straits Times*. B

The publication C

Publication dated 8 February 1998 by the first defendant

This publication with the title 'Another bungle by 'our' officials' is reproduced herewith:

> WHAT fools Malaysian sport makes of us at times. You feel cheated and annoyed when the mandarins of sport give a wishy-washy defence each time they bungle. D
>
> Sukom Accommodation Bureau (SAB) project coordinator John Eades joins the list this week.
>
> Eades, who works for Byrom Consultants Ltd, who are overseeing room inventory for Sukom Ninety Eight Bhd for the Commonwealth Games, in trying to justify the exorbitant hotel rates, insulted the intelligence of Malaysians. E
>
> Eades had some arguments in defence and one of which was that at the time the rate was fixed a US dollar was worth RM2.50.
>
> '... but the exchange rate has gone up to more than RM4 and obviously everything you buy whether it's furniture or hotel rooms will certainly go up', argued Eades. F
>
> I beg to differ.
>
> Currency depreciation has nothing to do with the rates. Hotel accommodation is a 'local product', so to speak. In fact, in times of a slowdown, hotels usually are generous with their discounts. G
>
> Eades was also wrong in saying that the rates charged in Kuala Lumpur were cheap compared to London or France who are hosting the soccer World Cup in June.
>
> Here it is not comparing apples with apples. Obviously, the rates should be cheaper here than most of Europe, whether it is during the World Cup or not. H
>
> Eades' third argument that 'we (Malaysia) should not underprice ourselves ...' is hard to accept.
>
> Eades should be reminded that we should also not price ourselves out if we wish to make Malaysia attractive to tourists. I
>
> Always remember, they (consumers) have a choice.
>
> SAB must remember the Commonwealth Games are not the only international sporting event scheduled for the year. The world will witness the

soccer World Cup, the Asian Games in Bangkok in December and this week's Winter Olympics in Nagano.

Of course there are the other major events such as the World Cup athletics in Durban, South Africa on Sept 11–13, the hockey World Cup in Utrecht, Holland in May and other annual major events such as the Rugby 7s in Hong Kong.

In short, there are enough events for discerning fans to choose from.

SAB should remember there is nothing worse than having the media highlighting the exorbitant prices in Kuala Lumpur. It is a sure way of killing KL as a tourist destination.

Now that SAB have announced that all hotels, bar one, will quote their rates in ringgit, it must be made clear that even then the rates should be competitive.

They should be the normal published rates, with some sort of discount. For example, SAB cannot allow the hotels to quote in ringgit, based on the present exchange rate. So a room which previously cost US$100 (RM250) cannot now be priced as RM380.

Actually, the brouhaha surrounding the hotel rates could have been avoided if Sukom had consulted the Olympic Council of Malaysia (OCM), the prime movers in getting the Games.

In their bid document, Malaysia had promised that there will be no excessive hikes in hotel rates and gave their word to the Commonwealth Games Federation (CGF).

'One of the factors that favoured us against Adelaide when we made the bid in 1992 was that our rates were far cheaper,' said OCM general secretary Sieh Kok Chi.

Sieh, who has attended numerous international Games, said SAB's initial rates were 'too high'.

Sieh draws comparison with the 1996 Atlanta Olympics. OCM paid US$185 nett a room (for two) at the Games' flagship hotel.

For delegates who attended the CGF assembly in Atlanta, OCM paid US$120 a room.

In Malaysia, the Palace of Golden Horses, the Games' flagship hotel, is charging US$200 a room.

Sukom should remember that most of the Commonwealth countries are not rich. In fact, the Falkland Islands have written to OCM asking for cheaper accommodation as they cannot afford the US$200.

Similarly, Mauritius sounded OCM for alternative accommodation.

Sukom should also ensure the rates for the media are affordable as most countries cannot afford these rates. The media is vital for the success of any Games as bad Press will not do the country's image any good.

Sukom should have shed some light on SAB.

SAB is a business arrangement between Sukom, London-based Byrom Consultants Ltd and Seamos Marketing, a company belonging to two Malaysian businesswomen, Noni Mahmood and Rohana Ramli.

It is based on profit sharing with Byrom and Seamos keeping 70 per cent and Sukom 30 per cent.

Sukom are expecting a minimum of RM2 million.

Sukom marketing director Rosli Selamat said the hotels are giving SAB a discount ranging between five and 35 per cent off the published rates. With a mark up of between five and 28 per cent, SAB are expected to make a cool RM10 million.

Rosli said Byrom, with their vast experience in handling the World Cup soccer tournament in Mexico as well as the USA '94 World Cup, will be in a position to 'manage room inventory to generate income for Sukom.'

'At any Games, accommodation is a source of income for the organisers. So we thought it was not a bad idea to have this arrangement,' said Rosli.

But Rosli denied Byrom have a monopoly on hotel rooms during the Games. Travel agents and individuals can opt to deal straight with hotels. According to him, some Australians have booked their rooms directly.

'We shortlisted 90 hotels including those in Langkawi. Seventy one signed with SAB.

'Twenty six of the 71 quoted their rates in ringgit, the rest in dollars. But now all of them are quoting in ringgit based on a RM2.52 to a dollar.'

And the Byrom offer does not provide the customary breakfast.

Publication dated 10 February 1998 by the second defendant

This publication with the title 'Let's not starve to death the very essence of the Games' is reproduced where it is relevant:

SPORTS is being given the short end of the stick again — the economic crunch a handy crutch to hobble on.

The preparation of athletes for the Commonwealth Games has been compromised. The Malaysia Games, Sukma, is a casualty — downsized from outsized through economic reality. The very athletes whom these Games are supposed to serve are being sacrificed.

Sure, it's all right to be frugal, thrifty and moderate. But why the obscenely extravagant budgets in the first place? Why should sports be made to pay a heavy price for the profligacy of the system?

The catch phrases, and we are ever so good at coining slogans, which sports officials have latched on to are 'cutting costs', 'tightening the belt', 'austerity drive' and such. If only they meant it.

But why should the national athletes and budding talent have to suffer the brunt of this sudden concern for cost effectiveness after the extravagance of past indiscretions?

...

Was there any need to put a whopping RM20 million budget for the Malaysia Games in the first place? Or those hundreds of millions for the Commonwealth Games? They were overbudgeted from the start.

When I raised these questions early last year, before the seams of the economy gave way, Sukom were indignant and outraged. I was assailed with invective and abuse.

But how do they explain the huge sums being drained through the payment of huge sums for rentals of halls, and to middlemen and sub-contractors.

How do they explain the fact that a middleman, in this case apparently middlewomen, is going to profit handsomely through the Sukom

A Accommodation Bureau (SAB) who are embroiled in a controversy over exorbitant hotel rates?

SAB are a business arrangement between Sukom, the London-based Byrom Consultants Ltd and Seamos Marketing, a company belonging to two Malaysian businesswomen — Noni Mahmood and Rohana Ramli.

B It is based on profit-sharing with Byrom and Seamons keeping a hefty 70 per cent and Sukom only 30 per cent.

What sort of deal is this? Why was it necessary for Seamos to be involved at all? Shouldn't, or couldn't, Sukom have entered into a direct deal with Byrom and split the profits 50-50?

C What was the need for Seamos? Who are Noni Mahmood and Rohana Ramli? Questions and more questions? In the interest of transparency and accountability, of course.

How many more such deals are draining the millions tied up with Sukom?

Sukom were set up to organise the Games and turn a profit, if they could, for sports. Not to enrich individuals. The profits would have been returned to D sports but at the rate they are going there is not going to be any and losses will be conveniently blamed on the economic slowdown. The signs are already there.

The Malaysia Games never needed such a massive RM20m budget in the first place. Indonesia hosted the last Sea Games for less.

E But it is all about style and one-upmanship and the opportunity to make a ringgit or two on the side, isn't it?

So now they make a grand show of whittling it down to RM5m and have done away with some sports depriving hundreds of young athletes the chance to test their mettle.

F ...

Let's control expenditure by all means, but let's not starve to death the very essence of the Games.

For ultimately, it's sports that matters, not the Sports Ministry, NSC, Sukom or the Selangor State Government.

G *The plaintiffs' claim*

The first plaintiff prayed for:

(1) General damages amounting to RM2.5m.

H (2) Aggravated and/or exemplary damages amounting to RM2.5m.

(3) Interest on all sums awarded at the rate of 8%pa from date of filing of the writ till full settlement.

(4) An order prohibiting the defendants or their employees, directors, agents from writing, printing, publishing and/or circulating the contents of both articles or by any other means, from defaming her.

I

The second plaintiff prayed for the same prayers (1) to (3) of the first plaintiff's claim. There was also a prayer for costs by both parties.

Factual error relating to the publication

The plaintiffs had resigned from Seamos as of 21 July 1997. The two impugned articles were published on 8 February 1998 and on 10 February 1998 respectively. Clearly both the plaintiffs were no longer either shareholders or directors or in any way involved with Seamos at the time the articles were published. It is therefore important to note that whilst the defendants, as admitted by them, could have easily ascertained whether the plaintiffs were indeed at the material time of the publication, directors and/or shareholders of Seamos by making a search at the Registrar of Companies, the defendants had failed to do so. The first defendant under cross-examination admitted he did not make a search which he could have done and the second defendant, a very senior and experienced journalist, admitted that he merely relied on the experience of the first defendant. He believed that since the first defendant had made the first publication, he would have done the necessary ground work and would have ascertained the fact that the plaintiffs were still involved in Seamos. In any case, in a defence of fair comment, the onus is on the defendants to prove any allegations of facts to be true, and this the defendants have failed to do.

Are the articles defamatory of the plaintiffs?

I accept the evidence of both the plaintiffs that the articles were defamatory of them and were calculated to disparage them in their respective office. I hold that the reference to 'Nonni Mahmood' and 'Rohana Ramli' in the articles referred to the first plaintiff and second plaintiff respectively. The first defendant in his article says:

> SAB is a business arrangement between Sukom, London-based Byrom Consultants Ltd and Seamons Marketing, a company belonging to two Malaysian businesswomen, Noni Mahmood and Rohana Ramli.

As I said earlier this is indeed a factual error. The allegation in the article that Byrom and Seamos were keeping 70% with Sukom only retaining 30% of huge profits based on exorbitant room rates was incorrect.

The second defendant in his article says:

> How do they explain the fact that a middleman, in this case apparently middlewomen, is going to profit handsomely through the Sukom Accommodation Bureau (SAB) who are embroiled in a controversy over exorbitant hotel rates?

There was clear reference to the two plaintiffs owning Seamos. The rhetorical questions of the second defendant,

> What was the need for Seamons? Who are Noni Mahmood and Rohana Ramli? Questions and more questions? In the interest of transparency and accountability, of course.

and the further question:

> How many more such deals are draining the millions tied up with Sukom?

clearly refer to the plaintiffs. I am satisfied that the articles when read as a whole would lead those who were dealing with the plaintiffs to the conclusion that the said articles referred to them and that both the said

articles were defamatory of the plaintiffs, and were written with the intention of identifying them. The test is an objective test. The inference that is clearly drawn from the first article is that the Bureau, having obtained discounts from the participating hotels in respect of their published rates, would be raising the hotel rates it would be offering, and would thus be able to reap a profit of RM10m and that the first and second plaintiffs as shareholders in Seamos would equally make millions. The result would be that the tourists would conclude that the hotel rates were far too high and this would prevent tourists from visiting Malaysia and in particular Kuala Lumpur.

To my mind, the contents of the second article clearly pointed out that the plaintiffs would make large profits from the involvement of Seamos in the Bureau. There is also the inference that the plaintiffs care only for their own self-interest motivated with the desire to reap large profits obtained discreetly and without transparency or accountability. The further inference is that due to the profits that Sukom and the plaintiffs would reap, the unfortunate athletes, who ought to be the full recipients of any profit that Sukom would have made had it gone on a 50-50 venture directly with Byrom, and without involving Seamos, are now deprived of the opportunity of benefiting from such profits, thus resulting in the cutting down of the events and items during the Commonwealth Games due to inadequate training, due to inadequate funds.

I also accept the fact that *The New Straits Times* is one of the foremost newspapers of this country and an almost household word with the Malaysian population having a wide and extensive circulation. I also accept the plaintiffs' evidence that they are respectively known as 'Nonni Mahmood' and 'Rohana Ramli' by everyone including those in the hotel industry.

As I said in *Ratus Mesra Sdn Bhd v Shaik Osman Majid* [1999] 3 MLJ 529 at p 535:

> ... the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it (see Gatley on *Libel and Slander* (Ninth Ed) para 3.12) and that for this purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. In fact at para 2.38 Gatley says that 'In the case of a newspaper article or television or radio broadcast, the defendant is entitled to have read as part of the plaintiff's case, the whole of the piece from which the alleged libel is extracted.

Whether the words complained of are defamatory or not is a question of fact depending on the circumstances of each case. The articles clearly suggested that the plaintiffs cared only to make a quick buck and had no regard to the fact that such conduct would have an adverse effect upon tourists visiting this country and especially during the Commonwealth Games and the plaintiffs being involved in the hotel industry would no doubt be adversely affected by such publications.

It was argued by the defendants that the plaintiffs had not identified the specific words or sentences that are defamatory of them. To my mind the

law of defamation would remain impotent if the courts were to put such a narrow and simplistic interpretation. Not only words and sentences can be defamatory, it is also possible, after reading the entire article, to hold that the said article read as a whole is defamatory of the plaintiff because of the chain of events entwined throughout the article, to form a tapestry, that portrayed the plaintiffs as the ones defamed.

Defence of fair comment

To succeed in this defence the defendants must establish four elements:

(i) The words complained of are comment, although they may consist or include inferences of fact;

(ii) The comment is on a matter of public interest;

(iii) The comment is based on facts; and

(iv) The comment is one which a fair-minded person can honestly make on the facts proved.

I shall apply these four tests to the case before me.

The averment as a fact that the two plaintiffs owned Seamos was a fatal crack in this defence. Further, the statement as a fact that the room rates were indeed exorbitant was again proven wrong through the evidence that was led. In respect of the second article the question,

> But how do they explain the huge sums being drained through the payment of huge sums for rentals of halls, and to middlemen and sub-contractors

suggests that it is a fact that such huge sums have indeed been drained when no evidence was led that this was so. There was, also the suggestion that the 'middlewomen', namely, the two plaintiffs herein were 'going to profit handsomely'. As I had stated earlier to realise the full import of the defamatory statement, the two articles have to be considered as a whole due to the link up of the various aspects and parties to these publications. Where the defendants rely on the defence of fair comment, it is necessary for the defendants to indicate what are the facts and what are the comments. But in this case, the first defendant admitted quite candidly that he failed to make a search at the Registry of Companies from where he could have easily ascertained that the two plaintiffs were never involved in Seamos nor were parties to the 'deal' he was accusing them of. The second defendant also very candidly admitted that since the first defendant was a senior and experienced writer he had concluded that the facts as stated by the first defendant must have been verified and ascertained as correct, because the second defendant based his second article relying totally on the first defendant's first article. It is clearly the duty of the defendants to write in such a way that the reader is able to distinguish between what is a fact and what is a comment. Where facts and comments are so intermingled as in this case, the reasonable reader would assume that the injurious statements are clearly based on adequate factual grounds known to the writers. It is no doubt trite law that any statement which does not indicate with reasonable clarity that it is a mere comment and not a statement of fact, cannot in my

A view be protected by the defence of fair comment. In fact, it is appropriate to cite Fletcher Moulton LJ in *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309, wherein his Lordship said in regard to the defence of fair comment at p 320:

> If the facts upon which the comment purports to be made do not exist the
B foundation of the plea fails.

However, it is also appropriate to remember that by virtue of s 9 of the Defamation Act 1957, the defence of fair comment 'shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or
C referred to in the words complained of. It is my judgment however that s 9 does not come to the aid of the defendants in this case. There is a fatal fundamental flaw in the defendants' assertion as a fact that the two plaintiffs were owners of Seamos at the material time of the publication when such was not a fact at all. Whilst it is undeniable that the articles revolved upon matters of public interest especially relating to boosting tourism in
D Malaysia, which needless to say would be enticed by reasonable hotel rates, yet freedom of speech coupled with a licence to write must be subject to the law of libel and slander for without these constraints persons and parties who have been unjustifiably maligned will have no recourse.

E *Malice*

It is set law that where a defendant is indifferent to the truth or otherwise of the words complained of, express or actual malice may be inferred (see *Ratus Mesra*, supra). It is clear that the first defendant had acted recklessly in failing to carry out any proper enquires of the plaintiffs' status in Seamos before concluding that they owned Seamos. He relied on his discussion with
F one Mohammad Rosly bin Md Selamat, PW4, who at the material time was the Director of Marketing of Sukom, for the background information relating to Sukom, Byrom and Seamos. However, PW4 emphatically maintained in his evidence that the first defendant did not ask of him if the plaintiffs were still with Seamos. However, he insisted that he informed the
G first defendant to check the details. I have no reason to doubt PW4. However, in any case the first defendant, who has been consistently allowed by the fifth defendant to write a feature column in 'The New Straits Times' entitled 'Point by Randhir Singh' in respect of matters relating to sports, and who then must of necessity possess the necessary skill, ability and flair, could have easily checked, as he admitted he did not, with the Registrar of
H Companies (ROC), to ascertain if the plaintiffs were shareholders and directors of Seamos at the time of his publication. The first defendant readily agreed under cross-examination that if his search at the ROC had disclosed that the two plaintiffs were no longer with Seamos he would not have mentioned their names. What is most surprising is the first defendant's admission that it never crossed his mind that if his facts were not right the
I plaintiffs would suffer tremendous damage. This admission is clearly indicative of a callous hand moved by a reckless mind, oblivious of ill consequences affecting the subjects of his penmanship. On his own

admission, he gave scant thought to the possible suffering the plaintiffs would undergo if his facts were untrue. The second defendant frankly admitted relying on the experience of the first defendant to check out and ascertain the facts. Herein lay his fault. It is necessary therefore that responsible newspapers insist that proper checks be made of basic facts which facts can easily be ascertained before publishing the articles. It is trite law that a writer may not suggest or invent facts and then comment upon them on the assumption that they are true (see *Joshua Benjamin Jeyaretnam v Goh Chok Tong* [1989] 3 MLJ 1 (PC)).

Qualified Privilege

This defence has been abandoned.

Defendants' intention immaterial

I must also bear in mind that whilst the defendants' intention could have been honourable it being their public duty as a reasonable and well accepted newspaper to comment on current issues that could affect or boost the country's economy, it is also pertinent for this court to remember that libel does not depend on the intention of the defamer and that it is irrelevant to consider the meaning the writers and publisher intended to convey. The question is to be determined by a reasonable reader. In fact the first defendant testified that he was referring to the issue relating to excessive mark-up of hotel rates during the Commonwealth Games and not to individuals. He was motivated to do so because of the numerous complaints concerning the Games. Whilst that might be the intention of the first defendant, by linking the plaintiffs to the company that was behind the excessive mark-up of the hotel rates, when the plaintiffs had nothing to do with the said company, the first defendant had clearly embroiled the plaintiffs with the issue. The defendants urged this court to rely on the case of *Charleston & Anor v News Group Newspapers Ltd* [1995] 2 WLR 450 and not give any weight to the headlines of the articles. I must hasten to add that the same authority reflected the view that a claim for libel whilst not to be founded on a headline or photograph in isolation from the related text, the question whether the article was defamatory had to be answered by reference to the response of the ordinary reasonable reader *to the entire publication* (Emphasis added). In respect of the second defendant I reject his explanation that his article referred to 'the essence of the Games, instead of the excesses of the Games'. He was careless in relying on the first defendant to launch an attack on Seamos and to link the plaintiffs to Seamos when the plaintiffs had left Seamos much earlier.

Damages

The words written by the first and second defendants were capable of a defamatory meaning and were indeed defamatory of the plaintiffs considering the fact that the so-called facts were proven to be untrue. The articles imputed to the plaintiffs' dishonourable and unscrupulous conduct and lack of integrity and such an imputation upon the character of the

plaintiffs certainly warrants reasonable damages. It is a fact that the libellous publications appeared in a reputable and leading newspaper in the country which has a wide circulation and since *The New Straits Times* is also carried by the airlines in their aircraft, they also have possible overseas circulation. Both the plaintiffs are obviously involved in the hotel industry for more than 25 years. The first plaintiff is a leading businesswoman and is also a director and shareholder of a public listed company and a director of several other companies dealing with tourism. She led evidence as to her siblings' impressive achievements. Clearly, she is a well recognised personality in the world of business. The second plaintiff had risen to the present position through dint of hard work. She led unchallenged evidence that she was appointed to the Malaysian Tourism Board by the Minister of Culture, Arts and Tourism because of her long and continuous relationship with the hotel industry. She is also a shareholder and director of a number of companies dealing with tourism and hotel services. Both plaintiffs led evidence as to their substantial income and present means.

Libel is actionable per se without proof of actual harm.

General Damages

Having found that the plaintiffs hold themselves high in the business world and considering the fact that *The New Straits Times* has a wide circulation in the country there is no doubt in my mind that the plaintiffs have by these publications been brought to ridicule and contempt. The plaintiffs had testified that they have been gravely injured in their reputation. In fact the second plaintiff had even been dropped from the Malaysian Tourism Board. The first plaintiff being the main shareholder of a public listed company cannot afford such taint upon her reputation. Having considered all factors, I award the first plaintiff general damages in the sum of RM300,000 and the second plaintiff the sum of RM200,000.

Aggravated damages

In considering an award under this category the court will take into account the conduct of the defendants from the time they received notification challenging their publications and up to the date of the conclusion of the trial. Whilst both the first and second defendants have clearly admitted during the trial, that had they known that the plaintiffs were not involved in Seamos they would not have involved them, I am at a loss to understand why the defendants could not have, as soon as they received a demand notice from the plaintiffs, immediately caused a check to be made with the Registry of Companies as to whether the plaintiffs were involved in Seamos at the time of both the publications. Their search would have shown the plaintiffs' non-involvement. Surely common sense dictates that immediately an apology could have been tendered in their same newspaper to mitigate the damages. Even assuming this did not occur to the defendants, I just cannot understand why the defendants went on defending this action without even tendering an apology in court. This nonchalant and indifferent attitude has prolonged the agony of the plaintiffs causing

unnecessary mental distress, hurt and anxiety. In fact the second plaintiff became emotional in court. In the light of the fact that even as I write this judgment no offer of apology has been tendered and considering the reckless manner in which the articles were written, clothing a non-existent fact with the mantle of truth, the award under this head must reflect the uncaring attitude of the defendants. With no basis for holding such a factual matrix the defendants were indeed foolhardy in persisting with the defence of fair comment. I therefore award each of the two plaintiffs a sum of RM200,000 as aggravated damages. There is no room in this case for exemplary damages which has not been seriously pursued in any event. In respect of the first plaintiff she will also have the additional prayers asked for prohibiting the defendants or their employees, directors, agents from writing, printing, publishing and/or circulating the contents of both articles or by any other means, from defaming her.

There will be interest on all awards at 4% from 10 Februay 1998 to date of judgment and costs.

Plaintiff's claim allowed.

Reported by Jafisah Jaafar